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IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Lisa McIntosh

COMPLAINANT

A N D:

Metro Aluminum Products Ltd. and Zbigniew Augustynowicz

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:	Enid Marion
Counsel for the Complainant:	Fred Wynne
Counsel for the Respondent:	David Sutherland
Dates of Hearing:	August 17-20, 2010

Complaint

[1] Lisa McIntosh filed a complaint against Metro Aluminum Products Ltd. ("Metro") and Zbigniew Augustynowicz (collectively the "Respondents"), alleging discrimination in employment based on sex (sexual harassment), contrary to s. 13 of the *Human Rights Code*. Specifically, she says that she was subjected to ongoing sexual harassment through unwanted text messages from Mr. Augustynowicz between June 27 and September 22, 2008, which ultimately caused her to leave her position.

[2] The Respondents deny any discriminatory conduct. They do not deny the specific text messages, but say the text messages did not constitute sexual harassment or any other form of discrimination. They say that Ms. McIntosh consented to, and participated in, all such communications, and that she sent similar text messages to Mr. Augustynowicz. They also say that Mr. Augustynowicz ceased texting Ms. McIntosh when she requested him to do so.

[3] At the outset of this decision, I note that Ms. McIntosh testified about a consensual sexual relationship with Mr. Augustynowicz. He initially objected to any evidence about this relationship, but withdrew the objection after Ms. McIntosh confirmed that the scope of her human rights complaint was limited to the allegation of sexual harassment based on repeated and unwelcome text messages after their sexual relationship ended. I consider Ms. McIntosh's admission of a prior consensual sexual relationship to have been relevant to my consideration of whether, in all the circumstances, the text messages constituted sexual harassment.

Credibility and Witnesses

[4] In determining what occurred, and when assessing credibility, I have remained mindful of whether the evidence of the witness is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny,* [1952] 2 D.L.R. 354 (B.C.C.A.), p. 357. I have also considered that I am entitled to accept some, none or all of a witness' evidence.

[5] Ms. McIntosh testified on her own behalf. She was responsive, non-evasive and unshaken during cross-examination. She also admitted to instances where her own actions could be open to question, such as stating “better go get yourself a hooker” in a text to Mr. Augustynowicz. Overall, I found her to be candid and reliable.

[6] Ms. McIntosh also called her mother, Mrs. Perrin, to testify about Mrs. Perrin’s observations of Ms. McIntosh during the material times. Mrs. Perrin was not challenged on any of her evidence. I did not find her to be prone to exaggeration or overstatement, and found her to reliably recount her observations and concerns about her daughter.

[7] Mr. William Fitzgerald testified on behalf of Metro. He has worked at Metro since 1999 and is the Shop Manager. He was Ms. McIntosh’s direct supervisor. I found him to be argumentative and inconsistent in areas of his evidence. In most areas where his evidence conflicted with Ms. McIntosh, I have preferred Ms. McIntosh’s evidence.

[8] Mr. Augustynowicz did not attend the hearing. On the first day of hearing, he was not in attendance at the 9:30 a.m. scheduled start time. I was advised that he was held up in traffic and would arrive shortly. After standing the hearing down to await his arrival, I was advised that he had become ill on his way to the hearing, and had gone instead to his doctor’s office. He did indicate, however, that he could be available by telephone if Ms. McIntosh wished to pursue settlement discussions. When she declined to do so, he sought an adjournment based on his unforeseen illness.

[9] Ms. McIntosh opposed any adjournment and sought costs in the event an adjournment was granted.

[10] I adjourned the hearing for the day, and directed Mr. Augustynowicz to provide a doctor’s note to the Tribunal regarding the medical reason for his absence. If Mr. Augustynowicz intended to seek a further adjournment, then he was to file an application to adjourn and a conference call would be scheduled for the next morning. I also indicated that any costs application could be argued at the conclusion of the hearing.

[11] An application to adjourn the remaining hearing dates was subsequently filed and a conference call was held the next morning. Mr. Augustynowicz requested the adjournment based on what was described generally as an acute medical illness, and

specifically as high blood pressure and diabetes. In support of his request, he submitted a doctor`s note, dated August 17, 2010, which stated: “This gentleman is unfit to attend to legal matters due to medical illness.” Mr. Augustynowicz said that he had received a prescription for his high blood pressure and that a follow-up doctor’s appointment had been scheduled.

[12] Mr. Augustynowicz argued that there would be no prejudice to Ms. McIntosh in adjourning the hearing. He noted that she was relying on an expert forensic report, which meant the evidence was preserved in documentary form. He also noted that she was not currently working, so would not suffer any wage loss as a result of rescheduling the hearing.

[13] Ms. McIntosh opposed the adjournment. She provided affidavit evidence that, in response to a phone call to Metro’s office, the affiant had been advised that Mr. Augustynowicz was in the office late in the morning on August 17 and had a scheduled meeting. Ms. McIntosh argued that if Mr. Augustynowicz was well enough to attend to business matters, then he was well enough to attend the hearing.

[14] Ms. McIntosh also argued that the doctor’s note provided insufficient information to support the adjournment of the balance of hearing dates. For example, it did not indicate whether Mr. Augustynowicz was only precluded from attending to legal matters on the day the note was written, what length of adjournment was required, or whether he could be accommodated in any way.

[15] Ms. McIntosh also argued that she would suffer undue prejudice if the hearing was adjourned. She noted that she had incurred expenses, including legal fees, to prepare for and attend the hearing, which would be unnecessarily duplicated if an adjournment was granted. Further, she said she was currently unemployed, in receipt of WorkSafe BC benefits and required to attend rehabilitation therapy on a daily basis. She had scheduled the time off to attend the hearing and said she would suffer a reduction in benefits as a result. Her 74-year-old mother had also driven out from Kelowna to attend the hearing.

[16] Mr. Augustynowicz agreed that the doctor’s note could be more detailed, but indicated that a “proper” medical report would require more time. He also argued that any prejudice could be addressed through costs.

[17] As noted in its *Rules of Practice and Procedure*, the Tribunal will first consider whether an adjournment request is reasonable in all the circumstances and, if so, will then consider whether an adjournment would unduly prejudice the other participants. See, for example, *Rothberger v. Matcon Civil Constructors Inc.*, 2009 BCHRT 334; *Kandola v. University of British Columbia*, 2006 BCHRT 126, para. 7; *Wright v. Franciscan Sisters of Atonement*, 2009 BCHRT 165, para. 20.

[18] I denied the application to adjourn the hearing on the basis that it was not reasonable. It was not denied that Mr. Augustynowicz attended at work on August 17, after requesting the hearing be adjourned due to medical reasons. There was no indication that Mr. Augustynowicz had been hospitalized, directed to rest at home, or had any other limitations on his abilities to engage in normal activities, except for "legal matters". Despite this limitation, he had been able to instruct legal counsel, and was willing and able to attend a telephone settlement conference.

[19] In the circumstances, I considered it reasonable to commence the hearing. The Tribunal has had innumerable witnesses and parties appear before it who have medical conditions, including diabetes and high blood pressure. If breaks were required to take medication, or other forms of accommodation were required (such as a longer lunch period or shorter hearing days), these could be implemented as necessary. If such measures were not sufficient, then a further application to adjourn could be made at that time.

[20] After I denied the adjournment, Mr. Augustynowicz declined to appear at the hearing, but instructed his counsel to attend. His counsel attended for the entirety of the hearing, conducted cross-examination and examination of witnesses, and delivered a closing argument. It was acknowledged that Mr. Augustynowicz understood that if he attended the hearing and experienced any health issues, accommodations would be made for him. No further medical information was presented and no request for accommodation was made to the Tribunal.

Evidence

[21] Metro manufactures and sells aluminum framed windows and doors. It has an office and a production shop and employs between 15-18 people.

[22] Ms. McIntosh is 40 years old with two adult children. She started work as a delivery driver at Metro on February 25, 2008. If work was slow, she would work inside "picking orders" and putting stock away. She regularly worked from 8 a.m. to 4 p.m. each weekday, as well as overtime. She testified that she averaged 6-7 work days per week.

[23] The majority of her work was driving. After her regular hours, she would help Mr. Fitzgerald with whatever needed to be done to fill orders. She would also help out on the thermal machine or "punch pressure plates."

[24] Ms. McIntosh testified that she initially loved working at Metro and felt it was the best job she ever had. She drove a truck, met new people, and learned different aspects of the company.

Relationship with Mr. Augustynowicz

[25] Ms. McIntosh met Mr. Augustynowicz when she started working at Metro, and was aware he owned the company. After about two weeks on the job, she encountered him in the hallway and he asked her when they would be going for a drink. She replied that she did not drink alcohol. She testified that he then said to her words to the effect of "how is a guy to take advantage of a girl if he can't get her drunk."

[26] At the end of the day, he again asked her about going for a drink. She assumed he was going to talk to her about an upcoming out-of-town business trip. She went to the pub with him, and drank tea. They spoke a little bit about the trip and then about their families. Ms. McIntosh testified that at one point he asked her if she would date him. She declined, and commented that he was married. He informed her that he was separated.

[27] After talking more, they left the pub. Once outside, Mr. Augustynowicz hugged Ms. McIntosh. She was taken aback and did not know how to respond. They each then went home.

[28] A few days later, Mr. Augustynowicz asked her if they could exchange phone numbers. She agreed. He later texted her and asked if they could meet before he left on holidays. She agreed. They met for coffee outside work, and he then went on his vacation.

[29] While he was gone, they texted back and forth. Sometimes they would talk over the phone. When he returned, they began what Ms. McIntosh described as a consensual sexual relationship.

[30] Ms. McIntosh described the relationship in some detail, much of which I do not consider necessary to review in this decision. Eventually, Ms. McIntosh learned that Mr. Augustynowicz was not separated. She testified that at or about the end June, she told him, both over the phone and by text, that she wanted to end the relationship and to only speak to each other on work-related matters. She said that he told her everything would be fine, and it would not affect her work.

[31] This did not turn out to be the case. Mr. Augustynowicz continued to text her messages that contained sexual propositions, sexually demeaning language and sexually provocative comments. For example, in his texts in June and July, he referred to her as a "bitch", asked if they could "hook up", told her he "needed a nooner", and made comments such as "how about a bj", "nice ass", "can I feel it."

[32] Ms. McIntosh testified that she told him verbally, and through text message, to stop treating her that way and to stop texting her such messages. She told him that he was making her feel very uncomfortable. She tried ignoring him. The texts continued, asking her why she was ignoring him. From her perspective, the more she ignored him, the worse the texts got. For example, she referred to text messages where he would ask to date her daughter or if she had "any horny girlfriends."

[33] Ms. McIntosh adopted other strategies to get Mr. Augustynowicz to stop sending her sexualized text messages, including "being mean back to him." She also told Mr. Augustynowicz that she was dating someone else. She admitted that she had made a boyfriend up in the hopes he would move on. He did not. In his text messages, Mr. Augustynowicz continued to refer to Ms. McIntosh as a "bitch" and referred to her boyfriend as "queer" and said that she would "turn [her boyfriend] queer."

[34] Ms. McIntosh admitted that she got angry, and said she "was almost to my breaking point" and could not take it any longer. She testified that she felt trapped, that her job was in jeopardy, and that she had no place to turn. She said that she tried to deal with it the best she could, but that Mr. Augustynowicz would not stop texting her. She

testified that she told Mr. Augustynowicz on several occasions only to talk to her in the workplace, but he would not "leave it alone" and she did not know how to get him to stop.

[35] Ms. McIntosh explained that she did not complain to Mr. Fitzgerald about the text messages because Mr. Augustynowicz had asked her to keep their relationship confidential, and she was afraid that Mr. Augustynowicz would retaliate against her.

Forensic Report

[36] Ms. McIntosh submitted a forensic digital report (the "Report") of certain text messages she received and sent on the two cellular phones she owned. There was no objection to its admissibility as an expert report and it was accepted as such.

[37] In preparing the Report, the forensic analyst reviewed Ms. McIntosh's human rights complaint and the Respondents' response to it. In addition, the forensic analyst assumed that the cell phones remained in the custody of Ms. McIntosh until sent for analysis and that all dates and times were recorded as reported on the cell phones. The forensic analyst noted that verification of dates and/or times as reported might require service provider account records or further analysis of data. I have taken these assumptions, and other identified limitations in the forensic examination process, into consideration when assessing the reliability of the data.

[38] Ms. McIntosh identified her phone numbers and Mr. Augustynowicz's phone number in the Report, and the text messages she received from Mr. Augustynowicz. She acknowledged there were discrepancies between the text times noted in her complaint and in the Report. For example, there is a one hour difference between the times listed in her complaint and the times recorded on the Report, which could be due to something as simple as a time change. It is evident that the sent and received times set out in the Report are not in chronological order, and that the times on the two phones may have been set differently.

[39] Ms. McIntosh testified that she did not save all the text messages she received from Mr. Augustynowicz or that she sent to him. She said there were so many messages that her phone became full, and she deleted some to free up space. She testified that she

deleted the simple ones such as “yes”, “no”, “ok’, and kept those messages that she considered to be the “more important” ones, including the ones she considered to be the most offensive. In this regard, she explained that she told Mr. Augustynowicz that she could send all his messages back to him so he could see how offensive they were and why she was upset. She said she wanted him to see the picture of what he was doing to her. She denied she kept the messages because she wanted to make a claim against him. Some of the deleted text messages were recovered through the forensic analysis, but some were not.

[40] The Report only contains text messages sent between June 27 and September 22, 2008. There is also no record of any texts being sent or received during August. Ms. McIntosh agreed that she and Mr. Augustynowicz were texting prior to June 27. She acknowledged that there were sexual references in those texts, but said the texts were not as “frequent or nasty” as after the relationship ended. She testified that she did not instruct the forensic analyst, and was unable to explain why the Report only contained text messages from June 27 onward. She was also unable to explain why the Report contained no text messages for the month of August and testified that there were text messages from Mr. Augustynowicz during that month.

[41] The Respondents did not challenge Ms. McIntosh’s evidence regarding the frequency or tenor of text messages prior to June 27, or that there were texts from Mr. Augustynowicz in August. The Respondents also did not submit any record of the texts that Mr. Augustynowicz may have been in possession of, or call any evidence to indicate that he tried to obtain his record of the texts from his service provider and had been unable to do so. In short, there was no attempt by Mr. Augustynowicz to complete the record or to dispute the content of the text messages as recorded in the Report.

[42] In the circumstances, despite the incomplete record and its chronological limitations, I accept that the content of the texts set out in the Report is accurate, and accept Ms. McIntosh’s evidence regarding the frequency and context of the messages from Mr. Augustynowicz.

The Texts

[43] The Report includes several messages where Ms. McIntosh asked Mr. Augustynowicz to stop "treating her that way." For example, an undated message reads:

> Do u honestly think that I was going 2 text or call after u call me a bitch. U know only bullies and boys call people names. I will not be treated that way and until u apologize 2 me and quit treating me that way I think that we should not talk outside work because I won't be treated like that. And for shit like that is why I prefer 2 stay single.

[44] Another undated message reads:

> Zbig, I told you that I was not going to talk to you anymore outside of work until you apologize to me for the way you have been treating me, and you have not even bothered to make an attempt and yet you continue to call me a bitch 6 times in fact. I will not be treated that way. So when you are ready to talk and apologize then I will talk to you.

[45] Ms. McIntosh believes she sent both these emails as the relationship was breaking up in June. She also testified that she told him to stop contacting her and calling her names in other text messages, as well as over the phone.

[46] Despite these requests, Ms. McIntosh continued to receive text messages from Mr. Augustynowicz, containing comments such as "still being a bitch"; "hi sexy"; "you will be single"; "now I know why you are single", "how about a bj"; "still acting like a bitch"; "I said, don't act like a bitch"; "don't be a woman"; "R u ready to start being nice"; "any horny girlfriends"; and "still hate me".

[47] On July 8, 2008, Ms. McIntosh sent the following message to Mr. Augustynowicz:

> I don't see how u were trying other than 2 call me names and then act like it is nothing. I don't call u names and u have never apologized. Just so u understand like I said before I won't put up with being treated that way and if that is how u treat women u want 2 be with then I guess u need 2 find a women that will because life is 2 short and I am not going 2 have that in my life anymore. I would rather be single. So if u want 2 talk, text me and we can get 2together.

[48] Ms. McIntosh explained that she was willing to talk to him about the way he was treating her. She said it was not an invitation to get back together, and she does not recall seeing him after July 8.

[49] On July 10, 2008, Mr. Augustynowicz sent the following messages to Ms. McIntosh:

> "Any horny girlfriends";
> "Guess not";
> "Can i date your daughter?";
> "R u ignoring me";
> "U are being rude again";
> "The hell with u, I tried".

[50] The next day, he texted her the following messages:

> "You don't have to be rude by ignoring my messages."
> "You don't to be rude by ignoring my messages."
> "Hookup later?"
> "Hookup later?"
> "Don't be such a bitch"
> "Don't be such a bitch"
> "Screw you, i had enough of your crap. Stay with your queer boyfriend"
> "I tried"

[51] The texts continued and, on July 24, 2008, Ms. McIntosh texted Mr. Augustynowicz that "U have been very rude and mean 2 me and I won't b treated that way." She also texted him that same day stating "better go get yourself a hooker or go home to your wife." This was in the context of having received texts from him such as "need hookers", "I need a nooner" and "any horny girlfriends." She explained that if she ignored Mr. Augustynowicz, it did not work, so sometimes she was "mean" back. She said nothing she did worked to get him to stop texting her.

[52] Later that day, she received the following texts from Mr. Augustynowicz: "any horny girlfriends with money"; "since u r taken"; "R u busy with your boyfriend?;" and "You must be to be so cold to me." The next day, amongst other things, he texted her asking if she was "having sex?" and then "without me?".

[53] On July 28, 2008, as in previous days, there was a relatively extensive text exchange between Mr. Augustynowicz and Ms. McIntosh. The times on the two phones appear to have been set differently, and it is difficult to accurately reconstruct the entire conversation. However, it is clear that during the conversation, Mr. Augustynowicz refers repeatedly to Ms. McIntosh's "queer" boyfriend, asks to date her daughter and asks why Ms. McIntosh "has nothing to say" and why she is "acting like a bitch." Ms. McIntosh acknowledged she sent several texts to Mr. Augustynowicz on that date, including one that stated "U r jelous that I am with someone else and not u that is why u r calling him names." She also acknowledged that she did not expressly state during that conversation "don't text me." She denied the messages were an invitation to Mr. Augustynowicz to get together with her.

[54] On July 31, Ms. McIntosh sent Mr. Augustynowicz the following message:

> Who do u think u r thinking that I would put up with your insults and all the name calling and bullshit. And if u need 2 have your memory refreshed I can send u all your text back and then maybe u just might realize why I don't want 2 talk 2 u.

[55] While there was no record of text messages in August, in early September there is a record of Mr. Augustynowicz sending Ms. McIntosh messages such as "Any horny girlfriends"; "this is your boy-toy"; and "looking good."

[56] On September 22, 2008, Ms. McIntosh sent him the following message:

> Zbig, I Told you months ago that I do not want to have ANY contact with you outside the workplace. Yet you continue to harass me. THIS WILL be the last time I TELL you to LOOSE MY NUMBER and DON't contact ANY WAY. Not at work or outside the workplace. Otherwise you leave me no choice to contact the police and make a formal complaint against you.

[57] She testified that this was the last message she sent to Mr. Augustynowicz. She said she had called the police to find out how to stop him from harassing her and was told to advise him that she would make a formal complaint.

[58] Ms. McIntosh identified a few text messages that she received from Mr. Augustynowicz shortly after sending this email, including "Why are you acting like a bitch?" and "any horny girlfriends?" She acknowledged that these were the last texts she received from Mr. Augustynowicz.

[59] In cross-examination, Ms. McIntosh agreed that her phone shows the phone number, date and time of the message when it arrives, and that she knew whether the message was from Mr. Augustynowicz. She said that if she received a text, she opened it. She agreed that it was her choice to open the message, and that she could have deleted the messages, but did not. She explained that one of the reasons for this was because she had sent Mr. Augustynowicz a message saying that she would send back all his messages to him so he could realize why she did not want to talk to him. She also testified that she saved the messages in case Mr. Augustynowicz retaliated against her, and that she was afraid of him. As well, she noted that part of the text was visible on the phone, even without opening the message.

[60] She agreed that Mr. Augustynowicz would also have these messages on his cell phone, but does not know whether or not he kept them.

[61] She agreed that she tried to be mean to him to get him to stop, and that she tried to play "a head game" with him, like he was playing with her. He would text her and she would text him back something he might not understand. She described one example of such texting.

[62] She also agreed that when she was in the office building, she worked in the production area and Mr. Augustynowicz worked in the office. She would see him from time to time, but did not recall speaking to him after July 8.

[63] Ms. McIntosh disagreed that Mr. Augustynowicz stopped texting her after she asked him to stop. She agreed that he eventually stopped, but not immediately. She testified that she had sent prior texts and told him to stop over the phone and he had not. It was only after she threatened to contact the police that the text messages stopped. She said this was her last effort.

Overtime

[64] When Ms. McIntosh first started work at Metro, she said Mr. Fitzgerald informed her that there was plenty of overtime work available and she could work as much overtime as she wanted. She regularly did so.

[65] However, at the end of July, Mr. Fitzgerald told her that Mr. Augustynowicz was "cutting back" and no one would be working overtime. She testified that Mr. Fitzgerald also told her that Mr. Augustynowicz had said to him "does she really need to be here – is it absolutely necessary?" She did not work overtime after that conversation. She said that, to her knowledge, she was the only person who had overtime hours cut. For example, the person she had regularly worked overtime with continued to be assigned overtime hours.

[66] Ms. McIntosh acknowledged that Mr. Fitzgerald did ask her "a couple of weeks" later if she would work overtime, and that she said no. She testified that she had decided she was not going to subject herself to more harassment, and that it was all she could do to get to work each day. She described it as very hard.

[67] Mr. Fitzgerald testified that everyone, except for one employee, had overtime hours cut and everyone was treated the same. He also testified that Mr. Augustynowicz did not mention Ms. McIntosh by name, but said to curtail all overtime, except for the one employee. He said that this occurred every year when business slowed down.

[68] On balance, I accept Mr. Fitzgerald's explanation that overtime was cut back for everyone. Even if Mr. Augustynowicz had asked Mr. Fitzgerald whether it was absolutely necessary to assign overtime to Ms. McIntosh, there was no evidence that he directed Mr. Fitzgerald to stop assigning her overtime if, in fact, it was necessary for the work to be done. Further, it is clear that Ms. McIntosh was again offered overtime, which she declined to work.

Stress Leave

[69] Ms. McIntosh testified that by the beginning of September she was "on the verge of a nervous breakdown." She went to see a doctor, and obtained a note to take a week off. While she was off work, Mr. Augustynowicz texted her stating "are you done working at Metro". She did not reply. The Report records the following text messages from Mr. Augustynowicz to Ms. McIntosh on September 3:

> Hope you are feeling ok
> Still busy with your boyfriend?
> Are you done working at metro?
> A reply would be nice

[70] He also texted her the following on September 8, 2009:

> R u going to live?
> Guess not

[71] On September 9, he sent her the following text messages:

> Still being yourself?
> Any horny girlfriends?
> Still acting like a bitch?
> This is your boy-toy

[72] There is no record or other evidence of any response by Ms. McIntosh to these text messages.

[73] Ms. McIntosh returned to work after her leave and continued to find it difficult to work. She went back to her doctor, and was advised to take a longer leave. She obtained another medical note stating she required 8-12 weeks off work for "work-related stress." She gave the note to Mr. Fitzgerald.

[74] Ms. McIntosh testified that she felt she could not go back into the work situation as it was making her physically and mentally ill. She had a medical history of colitis, which she said had been aggravated by the stress she was undergoing. She described the impact of the colitis on her, which included increased pain and medication.

[75] She testified that when she gave the note to Mr. Fitzgerald, he told her she had no choice but to look for a new job as she was the only driver. She testified she did not quit and was not fired, but was "forced to leave" her position.

[76] Mr. Fitzgerald agreed that Ms. McIntosh gave him a note saying she needed to take stress leave. He said that her position was important and he needed to fill it. He did not hear from her after that and assumed she quit her job after eight weeks of stress leave. He did not indicate that he made any attempts to contact her or ascertain when she might be fit to return to work.

[77] Ms. McIntosh received a Record of Employment ("ROE") dated October 1, 2008, which lists the reason for issuing as the ROE as "illness or injury". She received another ROE dated March 31, 2009, which includes the following comments "was on stress leave

until December 2008, have not received any new information, has not returned to work, have hired replacement." It also records that Ms. McIntosh was provided $1500 as "settlement pay".

Flirtatious and Provocative

[78] Mr. Fitzgerald described Ms. McIntosh as flirtatious towards the male employees and that he observed her "pinch" a male employee's "ass" as she walked by. He believes that she was "hitting on" the employee and said he heard her call the male employee her "boy toy" at least once per day. He agreed he did not receive a written complaint from the male employee, and that he did not give a written reprimand to Ms. McIntosh.

[79] Mr. Fitzgerald testified that, on one occasion, Ms. McIntosh "came onto" him. He said that she was wearing a tank top, bent down and made a lewd comment, which was "do you want to be my boy toy." He also testified that she would say "no man would ever beat her" and that she would be the boss.

[80] Mr. Fitzgerald said that he had discussions with Ms. McIntosh about her dress "every time" she was in the shop. He said that she would wear a halter top or string tank top to work, and that he instructed her to wear protection on her shoulders when she was in the shop. When he spoke to her about her dress, he said she would reply that "no man would ever bring her down." He testified that they had daily conversations about her dress.

[81] In cross-examination, Mr. Fitzgerald agreed that his concerns about dress had to do with safety considerations, and that he did not speak to Ms. McIntosh because she was dressed "sexy". He said his main concern was the pinch on the "butt". He agreed he did not give her a written reprimand, and said it was not his job to reprimand, but to ensure safety. He then agreed that he was responsible for discipline, and said he warned her that it was not safe for her to dress that way in the shop and it was a "wcb" issue.

[82] Ms. McIntosh denied that she habitually flirted with the men at work or that her favourite expression was that she was looking for a "boy toy". She agreed that she had used that term, but testified that it was said to her first. She denied flaunting herself at men or that she was spoken to several times about inappropriate dress in the workplace.

She denied wearing loose tops, being asked to stop and telling Mr. Fitzgerald that he could not tell her how to dress. She denied "coming onto" everyone and anyone, or that she "teased" a male co-worker, called him a "boy toy", or intentionally embarrassed him.

[83] I do not accept Mr. Fitzgerald's characterization of Ms. McIntosh as a workplace flirt who inappropriately touched at least one male employee and flaunted her body. I find his evidence in this regard to be unreliable and unsupported by any objective evidence, such as a written warning. If, as Mr. Fitzgerald said, Ms. McIntosh had been repeatedly acting or dressing in an inappropriate or unsafe manner in the workplace, a reasonable employer would have taken some corrective or disciplinary action. There was no evidence that Ms. McIntosh had been expressly warned that her dress was "immodest". As well, the male employee who was allegedly pinched and called a "boy toy" was not called as a witness. I accept Ms. McIntosh's evidence that she did not act in this manner.

[84] I also find this evidence to be of little relevance in determining whether Mr. Augustynowicz's text messages to Ms. McIntosh constituted sexual harassment. As noted in *Harrison v. Nixon Safety Consulting and others (No. 3),* 2008 BCHRT 462*:*

> I agree with Ms. Harrison's submission that many of the issues raised by the respondents in the course of the hearing are not relevant to the issues I must decide, particularly her relative friendliness or manner of dress....Whether faults could be found in Ms. Harrison as to how she fulfilled her responsibilities is only potentially relevant to the extent that it could have a negative impact on her overall credibility. I find that it does not. (para. 316)

[85] Similar to the conclusion in *Harrison*, at para. 267, I find that the attempt by the Respondents to portray Ms. McIntosh as sexually provocative in the workplace to be without merit.

Time Cards

[86] Mr. Fitzgerald testified that, on an unspecified date, he confronted Ms. McIntosh about a discrepancy between her actual hours worked and her time cards. He said they operated on an honesty system. The employee would write down their start and end time on a time card, he would sign it and payment would be issued to the employee based on the hours recorded.

[87] At some point, cameras were installed on the business premises. On one occasion when Ms. McIntosh was working overtime on a Saturday, Mr. Fitzgerald testified that he was given photos showing a 15-20 minute discrepancy between the start time she wrote down on her time card and when she had pulled into the lot. He said he showed her the picture, which had recorded the time her vehicle came into the lot, and she replied "Oh well" and they adjusted her time card before it was handed in. Mr. Fitzgerald believes this incident occurred one or two weeks prior to Ms. McIntosh going on an eight-week stress leave.

[88] In cross-examination, Mr. Fitzgerald agreed that it was a serious issue if someone was claiming pay for time not worked, and that it warranted discipline, up to and including termination. He said that he verbally warned Ms. McIntosh, but did not tell her that she could face further discipline if it occurred again. In his words, "should I have to say this more than once." He testified that it was his understanding he was legally required to give "four progressive steps" before terminating an employee, and that he would have wanted to establish those four progressive steps with all employees. He also said that he did not tell Ms. McIntosh about the four progressive steps policy.

[89] Mr. Fitzgerald does not know what happened to the photos, and said that no one asked him to look for them.

[90] Mr. Fitzgerald agreed that in response to an Employment Standards complaint filed by Ms. McIntosh regarding her overtime pay, he did not mention anything about her recording overtime hours that she had not worked. He agreed it was important information regarding her complaint, but said that no one asked him about it and he did not tell anyone. When it was put to him that he did not take it upon himself to tell anyone, he replied "what is there to tell?"

[91] In cross-examination, Ms. McIntosh denied being confronted by Mr. Fitzgerald about falsifying her time cards or the hours that she worked. She denied any conversation with Mr. Fitzgerald that the hours she recorded on her time sheet were in excess of what she actually worked.

[92] I prefer the evidence of Ms. McIntosh in this regard. The falsification of time cards is a serious issue. Had it occurred, it would have been reasonable for Metro to issue

a more formal warning to Ms. McIntosh, or to at least retain the photos and time cards showing the discrepancy. I also note that it was not pursued in final argument, and I would not have accepted in any event, that Ms. McIntosh's departure from the work place was due to this issue, as opposed to the circumstances involving Mr. Augustynowicz.

Mrs. Perrin

[93] Mrs. Perrin testified about her observations of her daughter during and after her employment at Metro. She is 74 years old and lives in Kelowna. She talks on the phone to Ms. McIntosh at least daily, and sometimes more than once per day. She also visits Ms. McIntosh, and her other children who reside in the Vancouver area, approximately four times per year. Ms. McIntosh visits her in Kelowna two or three times per year.

[94] Mrs. Perrin described her daughter as an "outdoor girl" who loves to drive. When she visited Ms. McIntosh in the Spring of 2008, she said that Ms. McIntosh appeared to have her colitis under control and was happy, "bubbly" and excited about her new job. However, by June, she said that Ms. McIntosh began to express "upset" during their phone conversations and often cry. She commented to Mrs. Perrin that her colitis was getting worse.

[95] Mrs. Perrin went to visit Ms. McIntosh in July and observed that she was "totally different". Mrs. Perrin testified that Ms. McIntosh would easily start crying and was very sad. She described Ms. McIntosh as becoming reclusive, and not wanting to go out with the family, but just to remain by herself.

[96] After the visit, Mrs. Perrin testified that Ms. McIntosh continued to cry during their daily phone calls, and would "breakdown" approximately 90% of the time. She described her daughter as a strong person who had been able to deal with life, but now she thought that her daughter was having a nervous breakdown. Mrs. Perrin said the crying got progressively worse until her daughter was "just sobbing" on the phone and sometimes was unable to continue their conversation.

[97] Mrs. Perrin felt her daughter needed her, and she came out to visit again in September 2008. She observed that Ms. McIntosh slept a lot. Ms. McIntosh used to be a wonderful cook, but did not cook during that visit. On prior visits, Mrs. Perrin said they

would go out shopping or for walks, but that Ms. McIntosh "just gave it all up" in September and did not want to go anywhere. Mrs. Perrin described her as "so demoralized".

[98] Mrs. Perrin has continued to speak to her daughter at least every day and encouraged her to seek counselling. She believes that Ms. McIntosh did so, and that it has helped her to become stronger and more able to deal with things. She described her daughter as being more involved in life since Fall 2009.

Analysis

[99] Ms. McIntosh filed her complaint under s. 13 of the *Code*, which provides:

> (1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of … sex...
>
> …
>
> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

[100] The onus is on Ms. McIntosh to establish, on a balance of probabilities, that the Respondents, or any of them, discriminated against her on the basis of sex (sexual harassment).

[101] Sexual harassment is a form of sex discrimination: *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, [1989] S.C.J. No. 41 (Q.L.). The Supreme Court of Canada defines sexual harassment broadly as:

> … unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment. It is…an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it…. (para. 56)

[102] The Court went on to quote with approval the following descriptions of sexual harassment:

> …Sexual harassment is any sexually-oriented practice that endangers an individual's continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity…
>
> …Harassment behaviour may manifest itself blatantly in forms such as leering, grabbing, and even sexual assault. More subtle forms of sexual harassment may include innuendos, and propositions for dates or sexual favours…. (para. 49)

[103] The Supreme Court of Canada also commented on the scope of circumstances that might constitute sexual harassment:

> …Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee fail to comply with the demands. Victims of harassment need not demonstrate that they were not hired, were denied a promotion or were dismissed from their employment as a result of their refusal to participate in sexual activity. This form of harassment, in which the victim suffers concrete economic loss for failing to submit to sexual demands, is simply one manifestation of sexual harassment, albeit a particularly blatant and ugly one. Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour (para. 52).

[104] There is no dispute between the parties that there is sexual content in the various text messages. The issue is whether Mr. Augustynowicz's sexualized text messages were unwelcome.

[105] The test for determining whether conduct is unwelcome is an objective one: would a reasonable person, taking into account all the circumstances, know that the comments were unwelcome.

[106] In *Mahmoodi v. University of British Columbia* (1999), 36 C.H.R.R. D/8 (B.C.H.R.T.); petition for judicial review dismissed 2001 BCSC 1256, the Tribunal set out the following considerations when assessing whether conduct is unwelcome:

i) A complainant is not required to expressly object unless the respondent would reasonably have no reason to suspect it was unwelcome;

ii) Behaviour may be both tolerated and unwelcome;

iii) Not only overt, but also subtle indications of unwelcomeness may be sufficient to communicate that conduct is unwelcome; and

iv) The reasons for submitting to conduct may be closely related to the power differential between the parties and the implied understanding that lack of co-operation could result in some form of disadvantage. (paras. 140-141).

[107] Ms. McIntosh says that she has proven that Mr. Augustynowicz's incessant and inappropriate text messages constituted unwelcome conduct. She acknowledges they had a consensual sexual relationship, but says she expressly ended the relationship and asked him to stop texting her sexualized text messages. He did not. She also says that the text messages were so extreme in content that any reasonable person, including Mr. Augustynowicz, would know or ought to have known, even without her express request to cease the offending communications, that after the sexual relationship ended any such conduct was unwelcome and inappropriate. In that regard, she says that the text messages created a sexualized work environment that she had to endure.

[108] She notes that the Tribunal has found that sexual comments made by the highest ranking individual at the worksite to a new employee who was a single mother, who needed the job, and who was trying to establish a career constituted conduct that the employer knew or ought to have known was unwelcome and inappropriate: *Harrison v. Nixon Safety Consulting and others (No. 3),* 2008 BCHRT 462. Similarly, in this case, she says that Mr. Augustynowicz was in a position of authority over her and that she was dependent on her job to earn her income.

[109] On the other hand, the Respondents say that it is not sufficient for Ms. McIntosh to simply establish that the text messages are insulting, crude or include name-calling. They say the messages must, after taking all the circumstances into consideration, constitute sexual harassment.

[110] In this regard, they say that the text messages do not constitute sexual harassment because:

a) Ms. McIntosh was a willing participant in the text messaging. However, they acknowledge that she objected to the contents of many of the messages from Mr. Augustynowicz, which they say she described as "mean and rude and he called me names";

b) She was not "the innocent person" that she portrayed at hearing, but used the phrase "boy toy", pinched a male employee's "rear" and dressed immodestly in the workplace;

c) In her complaint, Ms. McIntosh only describes 10-15% of the text messages as sexually harassing, and the rest as mentally abusive or demeaning;

d) Given the parties' previous relationship, "it is clear" that the messages were not unwelcome. In this regard, they note that on July 8, 2008 Ms. McIntosh invited Mr. Augustynowicz to text her if he wanted to get together and talk;

e) Ms. McIntosh sent dozens of messages to Mr. Augustynowicz, clearly engaging in consensual conversation with him, and even telling him that he was "jealous";

f) Despite the lack of clarity over the sequence of texts from each person, if the texts are put together logically, a conversation emerges in which Ms. McIntosh is actively participating;

g) The Report does not contain any text messages for the month of August, 2008;

h) Ms. McIntosh had to actively open the messages from Mr. Augustynowicz;

i) Ms. McIntosh did not personally meet with Mr. Augustynowicz after July 8, 2008;

j) When she asked him to cease texting her on September 22, 2008, he did so.

[111] In summary, the Respondents say that, given the past relationship between the parties, the texting was all part of a consensual "back and forth" conversation between Ms. McIntosh and Mr. Augustynowicz, and that Ms. McIntosh has not proven that Mr. Augustynowicz knew, or ought to have known, that the texts were unwelcome. They also say that the first time she clearly asked him to cease texting was on September 22, and that he did so. Therefore, in all the circumstances, the Respondents say that sexual harassment has not been proven by Ms. McIntosh.

[112] I will deal with each of these arguments in turn.

"*Willing Participant"*

[113] I do not accept that Ms. McIntosh was a "willing participant" in the text messaging. Her text messages do not reflect a willingness to be referred to in a sexually demeaning and derogatory manner, or to continue to engage in sexual banter with Mr. Augustynowicz. To the contrary, I find that she told Mr. Augustynowicz, both verbally and through text message, to stop "calling her names" (such as "cunt" and "bitch"), and

to stop "treating her badly" through his comments, which included the inappropriate sexual comments. Despite express requests, Mr. Augustynowicz did not stop making the comments.

"Workplace Flirt"

[114] As noted earlier in this decision, I do not accept that the characterization of Ms. McIntosh as a workplace "flirt" who dressed immodestly and used sexually inappropriate language in the workplace, or that her credibility was diminished by Mr. Fitzgerald's evidence about her workplace conduct.

Complaint Description of the Text Messages

[115] Ms. McIntosh's complaint describes an ongoing pattern of sexually inappropriate text messages. The fact that she only referred to a portion of the text messages as being sexually harassing does not recast the content of the texts, the adverse impact on her or whether, at law, the text messages constitute sexual harassment.

Prior Consensual Relationship

[116] I have given due consideration to the prior consensual sexual relationship between Ms. McIntosh and Mr. Augustynowicz, which included some texting that contained sexual content. Given this context, it was incumbent on Ms. McIntosh to clearly and expressly advise Mr. Augustynowicz that the relationship was over and she no longer wished to engage in sexual communications. I find that she did so, both orally and through text message. I also find that Mr. Augustynowicz did not respect this request. Instead, he continued to text her sexually demeaning, provocative and propositional comments. He knew, or ought to have known, that his sexualized text messages were unwelcome.

Her Texts

[117] I have also considered the fact that Ms. McIntosh referred to Mr. Augustynowicz as "jealous" and also referred to "hookers" in two texts. Considered in isolation, these comments might be illustrative of some consensual banter as described by the Respondents. However, when considered in context, the comments do not persuade me that Ms. McIntosh was extending an invitation to Mr. Augustynowicz to continue to

make sexually derogatory or demeaning comments to her, or that her words could reasonably be construed as welcoming such comments. Rather, her comments were made in the context of expressing a desire for him to leave her alone, and that she had moved on to another partner.

[118] I also note that when Ms. McIntosh did not reply to his texts, Mr. Augustynowicz continued to send her texts and deride her for not communicating with him. Mr. Augustynowicz was her employer and she was reliant on him for her financial security. It is not surprising that, in those circumstances, she adopted other strategies to try to get him to stop. Some of those strategies may have been ill-thought out and ineffective, such as the made-up boyfriend, but this does not relieve the Respondents from responsibility for Mr. Augustynowicz's sexually-inappropriate and offensive comments.

Text Sequencing

[119] In deciding what happened, I agree with the Respondents that I must try to discern what a practical and informed person would readily recognize as reasonable in the circumstances. After reviewing the texts, including Ms. McIntosh's, and considering the Respondents' reconstruction in final argument of what it says is a logical order to some of the clusters of texts, I find that, after she requested Mr. Augustynowicz to stop, Ms. McIntosh was subjected to repeated and unwelcome sexualized text messages.

[120] In reaching this conclusion, I have taken into consideration the chronological limitations of the text record, and that there is an incomplete text record. I accept Ms. McIntosh's evidence about the context in which the communications occurred, her reaction to it and its impact on her. The Respondents did not provide a more complete and chronologically accurate record in support of their position that the conversations were consensual banter. As noted earlier, there was no evidence that Mr. Augustynowicz was no longer in possession of the texts, or that he had tried but had been unable to obtain a more complete record of the text messages from his service provider.

[121] The disclosed texts occurred between June 27 and September 22. There were close to 200 texts from Mr. Augustynowicz during this period of time. While there is no record of any texts in August, I accept Ms. McIntosh's unchallenged evidence that were texts of a similar nature during this period.

[122] The texts reveal that, after their sexual relationship had ended and Ms. McIntosh had asked him to stop making such comments, Mr. Augustynowicz repeatedly texted sexual propositions or references to her, such as “need a nooner”, “how about a bj,” “I need a horny woman” or “nice ass”. The texts also contained sexually demeaning comments, such as “cunt” and “bitch.”

[123] The texts also reveal that Mr. Augustynowicz directly connected his relationship with Ms. McIntosh to her continued employment. At the end of an exchange of texts on July 31 (taking into consideration a one hour time differential), during which Ms. McIntosh indicated that she did not want to talk to Mr. Augustynowicz or put up with his name-calling and insults, Mr. Augustynowicz refers to her in a sexually demeaning manner and states that, “if you hate me so much maybe you should work for your queer boyfriend.” Given this, it is not surprising that Ms. McIntosh feared her job was in jeopardy.

Opening the Texts

[124] The fact that Ms. McIntosh opened the text messages and, on many occasions, responded to Mr. Augustynowicz, does not change the character of their conversation into one in which sexual comments were welcome. He was her employer and she had an interest in maintaining a working relationship with him.

[125] Nor does it change the fact that Mr. Augustynowicz sent texts of a sexually explicit and demeaning nature to Ms. McIntosh. The fact that she opened or did not delete his inappropriate text messages does not make her complicit in his misconduct. There were occasions when a short text would have been revealed on the screen without opening, such as “hi sexy” or “nice ass”. The content of other texts might not be readily discernible until the text was opened and read.

[126] As well, the texts reveal that there were periods when Ms. McIntosh did not respond to him, and Mr. Augustynowicz continued to text her about ignoring him. For example, he texted such messages as: “yes, that’s why you would not get back to me in the last two weeks”, “Yes, i known it is difficult to recognize my messages”, and “you don’t have to be difficult by ignoring my messages”. If Ms. McIntosh did not respond to

Mr. Augustynowicz, it was apparent that he continued to text her until he received some sort of reply from her.

[127] It was not up to Ms. McIntosh to refuse to open her texts and risk retaliation from her employer. It was Mr. Augustynowicz's responsibility not to sexually harass his employee.

[128] Nor do I find it significant that she indicated a willingness to talk to Mr. Augustynowicz, if he would do so respectfully and appropriately. As noted above, he was her employer and she had an interest in maintaining a respectful working relationship.

No August Texts

[129] I accept Ms. McIntosh's evidence that there were texts from Mr. Augustynowicz in August of a similar tone and content to the previous and subsequent texts. Even in the absence of such texts, my conclusion would remain the same.

No Personal Interaction After July 8

[130] The fact that Ms. McIntosh and Mr. Augustynowicz did not personally meet after July 8 is consistent with her ending the relationship and wanting to restrict their communications, as opposed to welcoming a continuing form of sexual conversation.

Ceased Texting When Asked To

[131] Finally, I do not accept that Mr. Augustynowicz ceased texting Ms. McIntosh inappropriate messages when she requested him to. He only ceased texting her after she threatened to contact the police.

Ongoing Sexual Harassment

[132] For the reasons noted above, I have concluded that Ms. McIntosh has proven that she was subjected to sexual harassment in her employment at Metro by Mr. Augustynowicz, its owner.

[133] As the owner of Metro, and Ms. McIntosh's employer, Mr. Augustynowicz was in a position of authority over her. He was responsible for the terms and conditions of her employment and for ensuring that she was employed in a workplace free of sexual harassment. He failed in this responsibility. He repeatedly referred to Ms. McIntosh in a

sexually demeaning manner in his communications to her. He knew, or ought to have known, that his sexual comments and propositions were offensive, inappropriate, and unlawful in an employment context.

[134] As consenting adults, Mr. Augustynowicz and Ms. McIntosh were entitled to enter into a sexual relationship, however ill-advised it might be in a workplace given their respective positions. However, once that relationship ended, and she communicated to him that she no longer wanted to engage in communications or conduct of a sexual nature, Mr. Augustynowicz had a legal responsibility to ensure that he ceased such communications and that the breakdown of their sexual relationship did not negatively impact Ms. McIntosh's working environment.

[135] After considering all the circumstances, including the overall context, tenor and content of the text messages, I find that Ms. McIntosh has proven that she was subjected to repeated comments of a sexual nature that Mr. Augustynowicz knew, or ought to have known, were unwelcome, and that detrimentally affected her work environment and led to adverse job-related consequences, including her departure from Metro. I accept that Mr. Fitzgerald replaced Ms. McIntosh after she left on sick leave, and that her departure from Metro was due to the sexual harassment.

[136] The complaint is justified against both Metro as Ms. McIntosh's employer, and Mr. Augustynowicz as its owner.

Remedy

[137] Having found the complaint to be justified against both Respondents, I will now address the appropriate remedies pursuant to s. 37(2) of the *Code*.

Cease the Contravention

[138] An order under s. 37(2)(a) is mandatory when a finding is made that a complaint is justified. Therefore, I order Metro and Mr. Augustynowicz to cease the contravention and refrain from committing the same or a similar contravention.

Declaration

[139] Ms. McIntosh requests a declaration pursuant to s. 37(2)(b) that the Respondents' conduct is discrimination contrary to the *Code* and it is so declared.

Lost Wages

[140] Pursuant to s. 37(2)(d)(ii) of the *Code*, the Tribunal has the discretion to award all, or part, of any wages lost as a result of the discriminatory conduct. The purpose of such an award is to put the complainant in the position she would have been, but for the discriminatory conduct.

[141] Ms. McIntosh did not seek any compensation for the period of time during which she was unable to work and in receipt of medical employment insurance benefits.

[142] She seeks compensation for lost overtime, but since I have concluded that the evidence does not establish her overtime was reduced because of the discriminatory conduct, I do not find such an award is warranted.

[143] She also seeks lost wages in the amount of $36,701.48 for the period January 2009 until November 23, 2009, when she commenced new employment.

[144] Ms. McIntosh applied for, and received, medical employment insurance benefits for approximately 15 weeks. She testified that once she had sufficiently recovered her health, she made reasonable efforts to seek new employment. She described her efforts in some detail. Her record of her job search shows she submitted between two to six applications a month until October, when she submitted 40 applications. Her first job interview was in September. She said she applied for jobs she felt qualified for, but did not "knock on doors" or make cold calls. She also obtained her air brake ticket which she thought would make her more competitive. She eventually secured a position and started work on November 23, 2009.

[145] The Respondents argue that Ms. McIntosh failed to reasonably mitigate her damages for lost wages as her job search consisted of so few applications until later in 2009. Ms. McIntosh says, however, that the onus is on the Respondents to prove a failure to mitigate and that they have not done so: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Vanton v. British Columbia Council of Human Rights*, [1994] B.C.J. No. 497.

[146] I agree with Ms. McIntosh that the Respondents did not identify any available position that she declined or failed to pursue. However, in exercising my remedial discretion under the *Code*, I am entitled to take into consideration all of the evidence

properly before me, including the extent of Ms. McIntosh's job search efforts, and I have done so.

[147] An award for lost wages is warranted in the circumstances. However, up until October, Ms. McIntosh's job search does not seem particularly diligent. I find it reasonable to conclude that if she had made a more committed effort to look for employment, that she would have obtained comparable employment sooner than November 23. Taking this into consideration, I award compensation for lost wages for a period of four months from January 1, 2009, which is the date she recovered her health, until April 30, 2009.

[148] Ms. McIntosh was earning $16.50 per hour and 4% vacation pay when she left Metro. Her gross earnings during her seven months of employment at Metro, as recorded on her ROE, were $23,250.79, which included her vacation and overtime pay. This is consistent with Ms. McIntosh's charted calculations and pay stubs. Since Ms. McIntosh did not work a full month in September 2008, I have calculated her average monthly earnings based on her actual earnings for the six-month period between March and August 2008. This results in an average monthly income of $3,623.45. Therefore, I order the Respondents to pay Ms. McIntosh a total award of $14,493.80 as compensation for lost wages.

Harassment Policy

[149] Ms. McIntosh also requests an order pursuant to s. 37(2)(c)(ii) that the Respondents take steps to ameliorate the effects of the discriminatory practice and adopt and implement a workplace policy regarding sexual harassment. There was no evidence regarding any human rights policies that may be in effect at Metro. Given the lack of any evidence on this issue, I decline to issue the order sought. I strongly encourage Metro to implement such a policy on its own initiative if there is not, in fact, already such a policy now in place.

Damages for Injury to Dignity, Feelings and Self-Respect

[150] Pursuant to s. 37(2)(d)(iii) of the *Code*, the Tribunal has the discretion to award Ms. McIntosh damages for injury to her dignity, feelings and self-respect. Ms. McIntosh

seeks an award of $20,000. She notes that the Tribunal made an award of $15,000 in *Harrison* and $25,000 in *Ratzloff v. Marpaul Construction and another*, 2010 BCHRT 13. She acknowledges that the circumstances of her complaint were not as severe as those in *Ratzloff*, but says there are some similar circumstances. She also says that the sexual harassment was pervasive as the text messages came day and night and invaded her entire life.

[151] The Respondents say that any damages for injury to dignity, feelings and self-respect should be in the range of $3,000 - $7,000. They say that the circumstances in *Harrison* were more egregious than this case and occurred over a longer period of time.

[152] In *Fougere v. Rallis and Kalamata Greek Taverna (No. 1)*, at para. 133, the Tribunal set out the following non-exhaustive factors it will consider when assessing damages for injury to dignity, feelings and self respect:

i) The nature of the harassment, that is, was it simply verbal or was it physical as well?
ii) The degree of aggressiveness and physical contact of the harassment;
iii) The ongoing nature, that is, the time period of the harassment;
iv) The frequency of the harassment;
v) The age of the complainant;
vi) The vulnerability of the complainant; and
vii) The psychological impact of the harassment on the complainant.

[153] In this case, the harassment is in written form, consisting of unwelcome sexual propositions and sexually-demeaning language. In that respect, it is more analogous to sexual harassment of a verbal nature, though I note that whether verbal, written or physical, sexual harassment of any kind can adversely and significantly affect a person's dignity and self-respect. In this case, I find that Mr. Augustynowicz's repeated sexual comments were of a serious nature. The texts were aggressive in tone, provocative and demeaning.

[154] Ms. McIntosh testified, and I accept, that the sexual harassment was occurring regularly between late June to September 22. As noted earlier, while there is no record of any texts in August, I accept Ms. McIntosh's evidence that there were texts of a similar nature occurring during that time. The sexual harassment was not an isolated incident, or

one or two comments, but was frequent, repetitive and particularly offensive. As well, Mr. Augustynowicz continued to send the messages after being advised they were unwelcome on more than one occasion, which makes his conduct more egregious.

[155] Ms. McIntosh's age is a relatively neutral factor which does not serve to increase or decrease any damage award.

[156] I find that Ms. McIntosh was particularly vulnerable given the power imbalance between her and Mr. Augustynowicz, her reliance on her employment to support herself, and her medical condition. The Respondents say that there is no evidence connecting the texting to her colitis or any other physical or emotional ailment. They say that her demeanour and stress level may have changed due to an aggravation of her colitis caused by other factors, such as the termination of the sexual relationship with Mr. Augustynowicz, which is not the subject of the complaint before the Tribunal. As they note, "not every affair has a happy ending, and ending a relationship can be traumatic. Who is to say the cause of the complainant's unhappiness?"

[157] I accept, and have taken into consideration in my assessment of damages under this heading, that there was most probably some physical and emotional impact arising out of the end of the consensual relationship. I also accept Ms. McIntosh's evidence that the incessant, sexually-harassing texting after the relationship ended made her "feel like garbage" and made her working life very difficult to endure. She testified the stress became overwhelming and that she was "almost on the verge having a nervous breakdown" in September. Ms. McIntosh was still in obvious emotional upset as she gave her evidence. It was apparent that there was a continuing impact on her, which included impact arising out of the sexual harassment.

[158] Ms. McIntosh also provided medical notes, one of which attested to "work related stress" requiring a significant period off work, as well as a medical note referring to an ongoing problem with ulcerative colitis in December 2008.

[159] Taking into consideration Ms. McIntosh's evidence, the medical information and Mrs. Perrin's observations of her daughter during the summer and fall of 2008, I am satisfied that there was a significant and ongoing physical and emotional impact of the sexual harassment on Ms. McIntosh.

[160] I have also considered the fact that the sexual harassment was at the core of Ms. McIntosh's departure from the workplace.

[161] After considering all of the above circumstances, I exercise my discretion pursuant to s. 37(2)(d)(iii) to award $12,500 to Ms. McIntosh as damages for injury to dignity, feelings and self-respect.

Expenses

[162] Ms. McIntosh requested reimbursement for the cost of the forensic report in the amount of $2,491.65, compensation for counselling sessions in the amount of $901.20; and reimbursement for the WorkSafe BC benefits she lost by attending four days of hearing. She testified that she receives approximately $1,023 every two weeks from WorkSafe BC, which is $102.30 per day, for a total loss of $409.20.

[163] I am not persuaded to reimburse Ms. McIntosh for her counselling expenses. She did not commence counselling until December 2009, which is approximately 15 months after the last incidence of sexual harassment. She did not seek any psychological or psychiatric treatment at the time of the harassment. She recovered from her physical illness and was fit to return to work by January 2009. While I accept that Ms. McIntosh is still experiencing some impact from the discriminatory conduct, and that counselling may have been of benefit to her, given the significant gap in time between the harassment and the counselling, I am not persuaded to exercise my discretion to order the Respondents to reimburse her for this expense.

[164] The Report and lost WorkSafe BC benefits were expenses incurred in pursuing her complaint, and pursuant to s. 37(2)(d)(iii) of the *Code*, I order the Respondents to pay to Ms. McIntosh the sum of $2,900.85.

Interest

[165] I order the Respondents to pay to Ms. McIntosh pre- and post-judgment interest on the award for lost wages commencing April 30, 2009 until paid in full, and post-judgment interest on the award for injury to dignity, feelings and self-respect until paid in full, based on the rates set out in the *Court Order Interest Act*. R.S.B.C. 1996, c. 79, as amended (the "*Act*").

Costs

[166] Ms. McIntosh also seeks costs against the Respondents for improper conduct, pursuant to s. 37(4) of the *Code*, on two bases:

a) An award in the amount of her reasonable legal fees based on the Respondents rejection of what she characterizes as a reasonable "with prejudice" settlement offer presented to the Respondents on August 11, 2010, which was one week prior to the start of the hearing; and

b) An award of costs on the basis that the Respondents were unsuccessful in their adjournment application.

[167] The request for reasonable legal fees was based on the Tribunal's decision in *Shannon v. Strata Plan KAS 1613*, 2009 BCHRT 438, where the respondent had rejected what was found to be a reasonable settlement offer and the Tribunal concluded that this, amongst other things, constituted improper conduct. The Tribunal drew an analogy to its discretion under s. 27(1)(d)(ii) of the *Code* to dismiss a complaint without a hearing on the basis that a complainant has refused a reasonable settlement offer and, in all the circumstances, it would not further the purposes of the *Code* to allow the complaint to proceed. In this regard, the Tribunal stated:

> Similarly, where a complainant makes a reasonable offer of settlement, which is rejected by the respondent, common sense dictates that the Tribunal is within its jurisdiction to penalize that respondent through an order for costs for improper conduct. Such a conclusion is consistent with the scheme and purpose of the *Code* and the intent reflected therein. To conclude otherwise would burden the Tribunal and parties willing to settle with unnecessary expenditures of time and money. This cannot have been the legislator's intent.
>
> This conclusion is consistent with the Tribunal's decisions in which it has ordered costs against complainants who have withdrawn their complaints on the eve of hearing, thereby forcing respondents, and the Tribunal, to incur unnecessary expenses, and in particular in the case of respondents, legal expenses, in dealing with their complaints: see *Samuda v. Olympic Industries Inc.*, 2009 BCHRT 65 and *Richardson v. Strata Plan (No. 3)*, 2009 BCHRT 158. By parity of reasoning, a respondent who forces a complainant, and the tribunal, to incur unnecessary expenses in dealing with a complaint, deserves to have costs ordered against them.

[168] The Respondents say that the settlement offer was unreasonable, both in its terms and its timing, and that the Tribunal should not be punishing respondents for refusing to accept what they consider to be an unreasonable settlement offer. They note that the offer

did not remain open for acceptance, but expired before the commencement of the hearing, and that the Respondents remained willing to engage in settlement discussions, including on the first day of hearing.

[169] I am not persuaded that the rejection of the settlement offer by the Respondents constituted improper conduct. Settlement is a voluntary process. In this case, the Respondents did not agree to the terms of the settlement offer, and there was no legal obligation for them to do so.

[170] Further, I do not agree that this situation is analogous to an application under s. 27(1)(d)(ii) of the *Code* to dismiss a complaint on the basis that the complainant has rejected a reasonable settlement offer. When the Tribunal determines such an application, one of the factors it considers is whether the settlement offer reasonably approximates what the Tribunal might award if the complaint was found to be justified. If it does, then, dependent on the circumstances of the case, there may be no justification for the parties and Tribunal to commit further time and resources to pursue the complaint to hearing. This is not the case here. Ms. McIntosh's offer does not approximate what the Tribunal might order if the Respondents' defence was successful, which is that the complaint would be dismissed without any monetary liability. Rather, the offer reflects a compromise of a disputed claim.

[171] I also note that the primary purpose of costs awards under s. 37(4) is punitive: *Fougere v. Rallis and Kalamata Greek Taverns (No. 2),* 2003 BCHRT 43, para. 14. Such an award is intended to have a deterrent effect and to sanction conduct that has a significant and detrimental impact on the integrity of the Tribunal's processes: *MacLean v. B.C. (Min. of Public Safety and Sol. Gen.) (No. 3),* 2006 BCHRT 103, para. 8. The Respondents rightly point out that they were entitled to present a defence to the complaint, and to require Ms. McIntosh to prove her complaint. They note that they followed the processes set out under the *Code*, complied with the Tribunal's *Rules of Practice and Procedure*, and exercised their legal right to present evidence and legal argument. They query how complying with the Tribunal's processes warrants a punitive award against them. I agree with these submissions.

[172] In reaching this conclusion, I note that, pursuant to s. 27.3(2)(i) of the *Code*, the Tribunal has the discretion to make a rule respecting procedures for formal offers to settle a complaint. When considered together with the Tribunal's discretion to award costs, I accept that the Tribunal could develop procedures for parties to make formal offers of settlement which, if not accepted, might then be considered in an application for costs after a decision is rendered. Such procedures would be applicable to both complainants and respondents.

[173] However, to date, the Tribunal has not developed or implemented procedures for formal offers to settle. As well, without commenting on whether the Tribunal would do so in the absence of such procedures, Ms. McIntosh did not seek an order pursuant to s. 27.3(3), that, in the event the complaint was found to be justified, she was free to bring an application for costs and to put the offer before the Tribunal for its consideration at that time.

[174] After considering these circumstances, I am not persuaded that the Respondents engaged in improper conduct when they rejected the "with prejudice" settlement offer.

[175] Ms. McIntosh also seeks costs in the amount of $3,000 for what she characterizes as the Respondents' improper conduct in seeking an adjournment for medical reasons on the first day of hearing. She says she incurred additional legal fees in preparing to respond to the application and obtaining affidavit evidence. She also notes that Mr. Augustynowicz was able to attend at work, and therefore disputes that he was truly unable to attend the hearing for medical reasons. Rather, she says he was deliberately avoiding appearing before the Tribunal, and that the manner in which he did so constitutes improper conduct.

[176] The Respondents say that the Tribunal's *Rules of Practice and Procedure* allow a party to make an adjournment application and they did so in good faith. They were unsuccessful and note that the hearing was conducted and completed within the scheduled days set for hearing. They say there was no prejudice to the Complainant as a result. They also note they did not contravene a rule, decision, order or direction of the Tribunal by either making the application or having counsel attend the hearing during its scheduled dates.

[177] I am not persuaded to award costs against the Respondents. They were entitled to bring the application to adjourn the hearing and, when it was not successful, proceeded to hearing, which finished within the scheduled dates. Further, Mr. Augustynowicz was also entitled to decline to attend the hearing. He was not subject to an Order to Attend. Had he attended, the hearing would have taken at least the full amount of scheduled hearing days and Ms. McIntosh would have incurred legal fees, in any event, for the first and subsequent days of hearing.

Summary

[178] I find the complaint is justified against both Respondents. I also find that Metro and Mr. Augustynowicz are jointly and severally liable.

[179] Pursuant to s. 37(2)(a), I order the Respondents to cease the contravention and refrain from committing the same or a similar contravention.

[180] Pursuant to s. 37(2)(b), I declare that the conduct of the Respondents was discrimination contrary to the *Code*.

[181] Pursuant to s. 37(2)(d)(ii), I order the Respondents to pay to Ms. McIntosh the sum of $14,493.80 as compensation for lost wages and $2,900.85 as reimbursement for expenses incurred by the contravention.

[182] Pursuant to s. 37(2)(d)(iii), I order the Respondents to pay to Ms. McIntosh the sum of $12,500 as damages for injury to dignity, feelings and self-respect.

[183] I further order the Respondents to pay to Ms. McIntosh pre- and post-judgment interest as set out above.

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Enid Marion, Tribunal Member